Koperasi Amanah Pelaburan Bhd v Bank Kerjasama Rakyat Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-143–03 OF 2023
ROZ MAWAR JC
16 JUNE 2023

Civil Procedure — Injunction — Whether any serious issue to consider — Defendant obtained High Court order requiring plaintiff-tenant to vacate its premises following expiry of tenancy period — Plaintiff wanting to continue with tenancy applied, but failed, to set aside High Court order or to injunct defendant from evicting plaintiff — When defendant applied for writ of possession, plaintiff again filed suit and sought interim injunction to prevent enforcement of High Court order — Whether injunction application was abuse of court process as plaintiff sought to re-litigate issues that had already been determined — Whether plaintiff's injunction application was made in bad faith and without making full and frank disclosure of material facts contrary to O 29 r 2A(e) and (f) of Rules of Court 2012 — Whether balance of convenience and justice of case favoured defendant — Whether damages were adequate remedy for plaintiff

The plaintiff had wanted an extension of tenancy of the defendant's premises after the initial three-year term expired. The defendant was not agreeable and applied to the sessions court to evict the plaintiff. The plaintiff applied for an injunction to stop the eviction, but the sessions court dismissed the application. The plaintiff appealed against the decision, but the High Court dismissed the appeal and ordered the plaintiff to vacate the premises by 30 September 2021 failing which the plaintiff had to pay the defendant double-rental if it remained in occupation after that date ('the High Court order'). The plaintiff applied for leave (which was denied) to appeal to the Court of Appeal against the High Court order and at the same time filed an originating summons ('OS') to injunct the defendant from evicting the plaintiff and also to set aside the High Court order on the ground that it was made without jurisdiction. The High Court dismissed the OS on the ground that it was an abuse of process. No appeal was lodged against that decision. The plaintiff then filed the instant suit. When the defendant obtained leave to file a writ of possession against the plaintiff, the plaintiff filed the instant application for an interim injunction to prevent the defendant from enforcing the High Court order until the instant suit had been disposed of. The plaintiff argued that the injunction was necessary to preserve the status quo as: (a) it would suffer irreparable damage if a television station the plaintiff operated at the premises was forced to relocate; (b) the plaintiff had spent more than RM1m to renovate the premises; and (c) damages were not an adequate remedy.

Held, dismissing the injunction application:

(1) The plaintiff's application for an interim injunction (as well as its instant suit) was an abuse of the court process. The plaintiff did not apply to stay the High Court order, nor did it appeal against the decision in the OS. Thus, both the High Court order and the decision in the OS were rendered final. The issues involved in both those proceedings became res judicata and could not be re-litigated. The plaintiff's instant action was a third attempt to re-litigate the same issues that had been raised earlier (see paras 12–15).

(2) To obtain the equitable relief of an injunction, the plaintiff had to come to Court with clean hands. This action was obviously tarnished by the several attempts to re-litigate the same issues. There was also considerable delay in filing the injunction application given that the High Court order had been in force since 25 June 2021. Even on the ground of inordinate delay, the instant application could not succeed. In addition, the plaintiff had, in breach of O 29 r 2A (e) and (f) of the Rules of Court 2012, failed to make full and frank disclosure of material facts such as its previous failed attempts to set aside the High Court order or to prevent its enforcement. There were also glimpses of bad faith as the instant application for interim injunction was filed just two weeks after the defendant had obtained leave to issue a writ of possession (see paras 16–17 & 24).

(3) The court was not satisfied that damages were not an adequate remedy. The expenses were quantifiable. The plaintiff's action was premised on tenancy and not ownership of the premises. An order for an interim injunction would not be suitable (see para 20).

(4) The balance of convenience and the justice of the case favoured the defendant. It was almost two years since the defendant had obtained the High Court order in its favour, yet it had not enjoyed the fruits of its litigation. In *S&M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717 the Federal Court ruled that equity would not allow a party to allege the existence of a tenancy when the same had been terminated. In the instant case, the High Court order was clear that the plaintiff was to vacate the premises and deliver up vacant possession of the same to the defendant (see paras 22–23).

[Bahasa Malaysia summary

Plaintif memohon tempoh penyewaan premis defendan dilanjutkan selepas tempoh tiga tahun pertama telah tamat. Defendan tidak bersetuju dan memohon kepada mahkamah sesyen untuk mengusir plaintif. Plaintif memohon injunksi bagi menghentikan pengusiran tersebut, namun mahkamah sesyen menolak permohonan itu. Plaintif merayu terhadap keputusan itu, namun Mahkamah Tinggi menolak rayuan tersebut dan

memerintahkan plaintif mengosongkan premis itu sebelum 30 September 202, dan jika gagal, plaintif perlu membayar sewa dua kali ganda kepada defendan sekiranya masih menetap di premis itu selepas tarikh perintah dikeluarkan ('perintah Mahkamah Tinggi'). Plaintif memohon kebenaran (yang ditolak) untuk merayu kepada Mahkamah Rayuan terhadap perintah Mahkamah Tinggi dan pada masa sama memfailkan saman pemula ('SP') untuk injunksi terhadap defendan daripada mengusir plaintif dan juga mengenepikan perintah Mahkamah Tinggi atas alasan ianya dibuat tanpa bidang kuasa mahkamah. Mahkamah Tinggi menolak SP tersebut atas alasan ianya adalah penyalahgunaan proses mahkamah. Tiada rayuan difailkan terhadap keputusan itu. Plaintif kemudian memfailkan saman ini. Apabila defendan memperoleh kebenaran untuk memfailkan writ pemilikan terhadap plaintif, plaintif memfailkan permohonan ini untuk mendapatkan injunksi interim bagi menghalang defendan daripada menguatkuasakan perintah Mahkamah Tinggi sehingga saman ini dilupuskan. Plaintif berhujah bahawa injunksi itu perlu untuk mengekalkan status quo kerana: (a) ianya akan menyebabkan kerugian yang tidak dapat dipulihkan sekiranya stesen televisyen yang dikendalikan plaintif di premis itu terpaksa dipindahkan; (b) plaintif telah membelanjakan lebih daripada RM1 juta untuk mengubah suai premis; dan (c) ganti rugi bukanlah remedi yang mencukupi.

Diputuskan, menolak permohonan injunksi:

(1) Permohonan plaintif untuk injunksi interim (serta saman ini) merupakan penyalahgunaan proses mahkamah. Plaintif tidak memohon untuk mengekalkan perintah Mahkamah Tinggi, dan juga tidak merayu terhadap keputusan SP. Oleh itu, kedua-dua perintah Mahkamah Tinggi dan keputusan SP adalah muktamad. Isu-isu yang terlibat dalam kedua-dua prosiding itu menjadi res judicata dan tidak boleh dibangkitkan semula. Tindakan plaintif ini merupakan percubaan ketiga untuk membangkitkan semula isu sama yang telah dibangkitkan sebelum ini (lihat perenggan 12–15).

(2) Untuk mendapatkan relif injunksi yang berekuiti, plaintif perlu hadir ke mahkamah dengan tangan yang bersih. Tindakan ini jelas dicemari oleh beberapa percubaan untuk membangkitkan semula isu yang sama. Terdapat juga kelewatan dalam memfailkan permohonan injunksi memandangkan perintah Mahkamah Tinggi telah berkuat kuasa sejak 25 Jun 2021. Walaupun atas alasan kelewatan yang tidak disengajakan, permohonan ini tidak dapat dibenarkan. Selain itu, plaintif juga telah melanggar A 29 k 2A (e) dan (f) Kaedah-Kaedah Mahkamah 2012 kerana gagal membuat pendedahan penuh mengenai fakta-fakta material seperti percubaan sebelumnya yang gagal mengenepikan perintah Mahkamah Tinggi atau untuk menghalang penguatkuasaannya. Terdapat juga niat buruk apabila permohonan injunksi interim ini difailkan hanya dua minggu selepas defendan memperoleh kebenaran

untuk mengeluarkan writ pemilikan (lihat perenggan 16–17 & 24).

(3) Mahkamah tidak berpuas hati dengan hujahan bahawa ganti rugi bukanlah remedi yang mencukupi. Jumlah kerugian tersebut boleh diukur. Tindakan plaintif itu berdasarkan penyewaan dan bukannya mengenai pemilikan premis itu. Perintah untuk injunksi interim adalah tidak sesuai (lihat perenggan 20).

(4) Keseimbangan dan keadilan kes memihak kepada defendan. Ketika hampir dua tahun sejak defendan memperoleh perintah Mahkamah Tinggi yang memihak kepadanya, mereka masih tidak memperoleh hasil litigasinya. Dalam *S&M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717 Mahkamah Persekutuan memutuskan bahawa ekuiti tidak akan membenarkan pihak untuk mendakwa wujudnya penyewaan apabila penyewaan itu telah ditamatkan. Dalam kes ini, perintah Mahkamah Tinggi jelas menunjukkan bahawa plaintif sepatutnya mengosongkan premis itu dan menyerahkan milikan kosong kepada defendan (lihat perenggan 22–23).]

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241; [1995] 1 CLJ 461, SC (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Associated Tractors Sdn Bhd v Chan Boon Heng & Anor [1990] 2 MLJ 408; [1990] 1 CLJ Rep 30, SC (refd)

David Cheah Seng Chye (bringing this action for and on behalf of himself and the beneficiaries of the estate of Cheah Leong Keah, deceased) v So Miau Song & Ors and other appeals [2023] 3 MLJ 726; [2023] 5 CLJ 20, CA (folld)

Ho Num Chon & Anor v Tech-Lab Manufacturing Sdn Bhd [2017] 9 MLJ 32, HC (refd)

Kasim a/l Musa & Ors v Maniam a/l Raman [2001] 6 MLJ 696; [2000] 1 LNS 387, HC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 3 CLJ 254, CA (refd)

Pembangunan Tanah dan Perumahan Sdn Bhd v Raja Qahaarruddin bin Raja Abdul Aziz [2020] 2 MLJ 462; [2020] 2 CLJ 519, CA (refd)

Penang Port Commission v Kanawagi s/o Seperumaniam [2008] 6 MLJ 686, CA (refd)

S&M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd [2015] 5 MLJ 717; [2015] 8 CLJ 16, FC (refd)

Legislation referred to

Rules of Court 2012 O 29 rr 2A, 2A(e), (f)

Sri Dev Nair (with Shamalah Selvarajah and Mohd Hafiz bin Mahmund) (Bodipalar Ponnudurai De Silva) for the plaintiff.

Muhammad Ali Redha bin Ahmad Rashidi (with Mohd Munzeer bin Zainul Abidin and Mohammad Zaid bin Daud @ Daud Yatimee) (Yusfarizal, Aziz & Zaid) for the defendant.

Roz Mawar Rozain JC:

INTRODUCTION

[1] In the afternoon of 16 May 2023, this application came before this court where the plaintiff sought for an interim injunction to prohibit the defendant from enforcing the High Court order dated 25 June 2021, namely (the plaintiff is the *perayu* and the defendant is the *responden* named in the High Court order):

> (a) Perayu hendaklah pindah keluar daripada Premis responden atau memberi milikan kosong dalam tempoh tiga (3) bulan iaitu pada dan/atau sebelum 30 September 2021 yang mana Perayu hendaklah terus membayar sewa buanan seperti kadar sewa bulanan yang telah dibayar sewa bulanan yang telah dibayar sepanjang tempoh 2021 iaitu RM74,911.10 sebulan sehingga 30 September 2021;
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> (b) Sekiranya Perayu gagal untuk pindah keluar dari Premis responden tersebut/gagal memberi milikan kosong selepas 30 September 2021, maka Perayu hendaklah membayar sewa bulanan berganda ('double rental') kepada responden sehingga urusan pemindahan selesai dan sehingga penyerahan kosong, mana- mana yang terakhir; dan
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> (c) Selanjutnya adalah diperintahkan bahawa kesemua hak-hak responden sepertimana di dalam Perjanjian Penyewaan bertarikhk 4.8.2017 adalah dikekalkan.

[2] The High Court order was a decision that dismissed the plaintiff's appeal against the session court order that ruled against it. This court after perusing the cause papers, affidavits and taking into account the oral submissions by both parties, dismissed this application to injunct the defendant from executing and enforcing the High Court order, with costs of RM10,000.

[3] This court found that this was not an instant where the equitable relief of an injunction was appropriate. Before detailing the reasons for the said decision to dismiss, below are the salient facts and the chronology of events that led to the application bearing relevance.

A NARRATIVE OF THE PLAINTIFF'S CASE

[4] The defendant, the registered proprietor of the premises with the address of Lot 18.01 Level 18, Menara 2, Menara Kembar Bank Rakyat, No 33, Jalan Rakyat 50470 Kuala Lumpur had tenanted the premise to the plaintiff. The tenancy was for three years which was from 1 June 2017 to 31 May 2020. There was a dispute that arose as to the extension of the tenancy that resulted in the plaintiff seeking a court declaration for an extension of the tenancy.

[5] The plaintiff sought an injunction to stop the defendant from eviction but it was dismissed by the session court on 2 February 2021. The plaintiff then appealed to the High Court which was also dismissed on 25 June 2021. This is the High Court order that is the subject matter of the application.

[6] An application for leave to appeal to the Court of Appeal, against the High Court order was also dismissed on 29 September 2021. Hence, the High Court order of 25 June 2021 that affirmed the session court order of 2 February 2021 remains in force. There is no extension of tenancy for the premises and the plaintiff was required to vacate and deliver vacant possession of the premises to the defendant by 30 September 2021.

[7] The plaintiff was required to pay rent to the defendant as agreed until 30 September 2021, after of which the plaintiff was required to pay to the defendant double rental amount monthly until the plaintiff deliver vacant possession of the premises to the defendant.

[8] At the same time, the plaintiff then filed a suit to injunct the defendant from evicting the plaintiff and to set aside the High Court order. This Originating Summons WA-24NCvC-1705–09 of 2021 ('OS 1705') by the plaintiff cited that the previous High Court decision lacked jurisdiction so the High Court order was null and void.

[9] On 24 September 2021 (a week before the dismissal of the plaintiff's leave application by the Court of Appeal), the High Court dismissed OS 1705 on the grounds of abuse of the court process. No appeal was lodged against this OS 1705 decision.

[10] On 27 March 2023, said to have been prompted by yet another demand by the defendant for vacant possession of the premises, the plaintiff lodged this suit. The defendant then on 7 April 2023 obtained leave to file a writ for possession (the defendant filed the application on 14 April 2022). So, this had impelled the plaintiff to file this application to injunct the defendant from enforcing the High Court order of 25 June 2021 that was effective all the while.

THE INTERIM INJUNCTION APPLICATION

[11] It was the plaintiff's submission that the interim injunction was pertinent to maintain the status quo pending the disposal of this suit. Otherwise, this court heard, the suit would be rendered academic, redundant and nugatory. The plaintiff further contended that it would suffer irreparable damage to its reputation in the event *Awesome TV* which was currently operating at the premises was constrained to relocate its business activities. The plaintiff averred that it had spent more than RM1m for renovation expenses of the premises tenanted from the defendant. The plaintiff claimed that damages were an inadequate remedy. The bona fide issues to be tried according to the plaintiff include:

(a) whether the High Court had jurisdiction to grant such orders on 25 June 2021;

(b) whether the High Court order was null and void due to lack of jurisdiction and ought to be set aside;

(c) whether the High Court order was granted in breach of trite law that parties were bound by their pleadings;

(d) whether the High Court order was granted in breach of the rules of natural justice;

(e) whether the plaintiff was given an opportunity to be heard;

(f) whether the plaintiff was denied a fair and impartial hearing; and/or

(g) whether the High Court had exceeded its jurisdiction in granting the order on 25 June 2021.

THE ANALYSIS AND DECISION OF THIS COURT

[12] From the outset, this court finds that this application ('encl 5') to move the court for an equitable order of injunction is an abuse of the court process. In essence, the plaintiff is seeking to injunct and prohibit the defendant from executing the High Court order of 25 June 2021. There was no application to stay the High Court order of 25 June 2021 nor was there an appeal against the OS1705 decision, which to this court's mind is the correct avenue to temporarily freeze/stay, so to speak, the execution of the same. Thus, the High Court order dated 25 June 2023 and OS1705 have been rendered final, there being no extant appeal. Once the order has been perfected and regularly obtained, the court is functus officio to hear the same matter. As such, the matter is now res judicata and cannot be relitigated. The Court of Appeal in *Pembangunan Tanah dan Perumahan Sdn Bhd v Raja Qahaarruddin bin Raja Abdul Aziz* [2020] 2 MLJ 462; [2020] 2 CLJ 519 held that:

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> There must be an end to all litigation involving the same issue either because the affected party had not exercised its right of appeal or that it has exhausted all avenues of setting aside the impugned judgment or subsequent consent order.

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[13] There were earlier attempts to attain the objective of continued tenancy and evade eviction of the premises — the High Court order of 25 June 2021 was the result, as with the dismissal of OS 1705. This application for the interim injunction was clearly an abuse of the court process (in fact from this viewpoint, this suit lodged as well). The issues put forth and argued as serious bona fide triable issues had been dealt with on numerous occasions by our courts at three different levels.

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[14] The plaintiff action amounted to the same action on a third attempt. The principle of res judicata wholly applied in this instant. The Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 premised its decision on the principle:

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> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

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[15] Authorities that bound this court affirmed that the plaintiff's action was equivalent to an attempt to re-litigate the same issues raised several times earlier — the Court of Appeal held in *David Cheah Seng Chye (bringing this action for and on behalf of himself and the beneficiaries of the estate of Cheah Leong Keah, deceased) v So Miau Song & Ors and other appeals* [2023] 3 MLJ 726; [2023] 5 CLJ 20 that the High Court judge Justice Ahmad Shahrir Mohd Salleh was correct in applying the principle of res judicata on a matter before him which was litigated and adjudicated earlier to which there was no appeal.

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[16] The plaintiff in seeking the equitable relief for an order to injunct another must come with clean hands. This action was obviously tarnished by its numerous attempts to open litigation before the courts. Moreover, this court noted that there was considerable delay to seek for this order which the plaintiff claimed was pertinent to preserve the status quo. The High Court order of 25 June 2021 had been effective since it was meted out. The defendant had made numerous requests for the delivery of vacant possession of the premises to

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no avail. The plaintiff were highly aware and had full knowledge of their legal obligations mandated by the High Court order. So, even on the principle of inordinate delay, this application cannot succeed — see *Kasim a/l Musa & Ors v Maniam a/l Raman* [2001] 6 MLJ 696; [2000] 1 LNS 387.

[17] On the other hand, there were glimpses of bad faith on the part of the plaintiff as encl 5 to apply for an interim injunction was filed on 20 April 2023, after the defendant had obtained leave for writ of possession two weeks prior.

[18] Nevertheless, for such an application, consideration must be made as to whether there were serious questions to be tried, whether damages would be an adequate remedy and whether the balance of convenience or justice of the case; as per *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 and *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 3 CLJ 254.

[19] This court doubted the issues that the appellant argued as serious bona fide issues to be tried warranted the grant of the injunction prayed for. They had been adjudicated in the previous suits. A re-litigation of the issues must not be allowed as it was estopped by the principle of res judicata.

[20] This court further was not satisfied that damages were not an adequate remedy. The expenses spent were quantifiable. The plaintiff's action was premised on tenancy, not ownership of the premises. Interlocutory order for an interim injunction would not be suitable — *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408; [1990] 1 CLJ Rep 30.

[21] This court considered the truth borne out of the High Court order of 25 June 2021 which was the fact that the defendant, the legal and rightful owner of the premises, had an immediate right by 30 September 2021 to the vacant possession of the same. The defendant was also entitled to all the rentals due from the plaintiff — double rental from 30 September 2021 onwards.

[22] The balance of convenience and justice in the case was with the defendant. Almost two years later, the defendant had yet to enjoy the fruits of litigation. The Supreme Court's decision in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241; [1995] 1 CLJ 461 had reference, the test iterated as follows:

> On the one hand, there is a risk that if the interlocutory injunction is refused but the plaintiffs succeed in establishing at the trial their legal rights to the protection for which the injunction has been sought they may in the meantime have suffered harm and inconvenience or monetary loss for which an award of money can provide no adequate recompense. On the other hand, there is the risk that if the interlocutory

injunction is granted but the plaintiffs fail at the trial, the defendants may in the meantime have suffered harm and inconvenience which is similarly irrecompensable.

[23] The Federal Court ruled in *S&M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717; [2015] 8 CLJ 16 that equity would not allow any party to allege a tenancy existed when it was terminated. In this instant before this court, there was confirmation in the most certain clarity that the plaintiff was to vacate the premises and deliver vacant possession of the same to the defendant.

[24] This court had also noted that the plaintiff had omitted to provide full and frank disclosure on the fact that they had attempted to set aside the High Court order of 25 June 2021 before but had failed. OS 1705 was not disclosed and this Court found that to be a material fact. The plaintiff thus had not complied with O 29 r 2A(e) and (f) of the Rules of Court 2012 ('the ROC'). O 29 r 2A provided that the affidavit in support of an ex parte application must contain a clear and concise statement of:

(e) any facts which may lead the Court not to grant the application ex parte or at all;

(f) any similar application made to another Judge, and the order made on that application;

[25] This court found that the plaintiff had not been entirely honest in seeking this equitable relief. This would also amount to an abuse of the court process (see *Ho Num Chon & Anor v Tech-Lab Manufacturing Sdn Bhd* [2017] 9 MLJ 32 and *Penang Port Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686).

CONCLUSION

[26] Based on the above, this court did not allow the application. Enclosure 5 for an interim injunction preventing the defendant to enforce the High Court order of 25 June 2021 is hereby dismissed with costs of RM10,000.

Application for injunction dismissed.

Reported by Ashok Kumar